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IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE,
R.S.O. 1980, CHAPTER 340

AND IN THE MATTER OF the complaint of Mrs. Lynda Mitchell
against Traveller Inn (Sudbury) Limited



BOARD OF INQUIRY

Robert W. Kerr

Appearances:

Ms. Michele Smith)	Counsel for the Ontario Human Rights Commission
Mr. John Poupore)	Counsel for the Respondent, Traveller Inn (Sudbury) Limited
Mrs. Lynda Mitchell)	Complainant
Dates of Hearing)	September 28 and 29, 1981
Place of Hearing)	Family Court Room B 40 Larch Street Sudbury, Ontario

AMENDMENT TO PROCEEDINGS

On motion by counsel for the Ontario Human Rights Commission and with the consent of counsel for the Respondent, the proceedings were amended at the opening of the hearing to show the correct corporate name of the Respondent, Traveller Inn (Sudbury) Limited. In the documents initiating these proceedings the name of the Respondent had been given as Traveller's Inn Motel.

DECISION

The complainant alleges that she was discriminated against in respect to employment on the basis of sex by the respondent, which operates a motel and restaurant business, in that she was asked to submit to sexual advances by the manager of the respondent as a condition of employment and was denied employment when she refused such advances. These allegations involve what is commonly called sexual harassment.

It is now well established by the decisions of human rights tribunals in Ontario that sexual harassment as a condition of employment violates section 4(1)(g) of The Ontario Human Rights Code, R.S.O. 1980, c. 340 as a discriminatory condition of employment and may constitute a violation of other provisions of section 4(1) if a requisite related action, such as dismissal or refusal to hire, occurs: Bell v. Ladas and Flaming Steer Steak House Tavern Inc. (Ontario Board of Inquiry, Shime, 1980); Coutroubis and Kekatos v. Sklavos (Ontario Board of Inquiry, Ratushny, 1981); Hughes and White v. Dollar Snack Bar and Jeckel (Ontario Board of Inquiry, Kerr, 1981).

THE FACTS

The dispute in this case revolves around whether the alleged sexual harassment did in fact occur. The evidence of the complainant and that of the respondent's agents is in sharp conflict on this matter.

The complainant testified that, after having left her name and telephone number with someone in the respondent's office a few weeks earlier by way of application for employment, she received a series of telephone calls on September 20, 1978, asking if she could report to work as a waitress at the respondent's place of business. The first call in mid-afternoon asked her

to report that evening, but she gave a tentative refusal because she had a babysitting commitment. She later confirmed by telephone that she was unable to work that evening. A couple of hours later she received another call asking her to report at 8:00 a.m. on September 21. She accepted this offer of employment and was given instructions as to the appropriate attire.

The complainant testified that she reported for work the following morning at 7:55 a.m. She spoke to Mr. Czaikowski, who was president and manager of the respondent during the period relevant to this case, and who was working at the respondent's reception desk when the complainant arrived. She was asked to write her name, address, telephone and social insurance number on a piece of paper. There were no customers in the coffee shop adjacent to the office at this hour, however. The complainant asked what she should do, and Mr. Czaikowski, according to her testimony, asked her to go to the backroom with him. She interpreted this request as having a sexual connotation and declined. He advised her that, if she did not, she would not have a job. He also offered to drive her home, suggesting it might be fun. She insisted that he call a taxi for her, which eventually he did, and she left in the taxi.

According to Mr. Czaikowski's testimony, however, the complainant appeared in the respondent's office on September 21, 1978 without any prior communication from the respondent. She appeared in an intoxicated state and demanded employment. He told her there was no work available and even suggested to her that she could see for herself, by looking down the hall, that all of the guests were still in their rooms with "Do Not Disturb" signs out. She then made a telephone call to someone with whom she had been recently partying, in so far as Mr. Czaikowski could interpret from hearing one side of the conversation. On her insistence he did subsequently call a taxi for her and she left in the taxi.

The testimony of the complainant was corroborated by a complaint she made to the Sudbury Regional Police about an hour after the events in question. Constable McCauley, to whom she spoke, testified as to his conversation over the telephone with someone named Lynda. While some question was raised as to whether this was sufficient to identify the caller, the similarity between the allegations made by the complainant, whose first name is, of course, Lynda, and the notes taken by the Constable McCauley leave no room for coincidence. I am satisfied that he was speaking to the complainant. Since it was not a matter within his jurisdiction, there is nothing strange in the fact that the police officer did not record the caller's last name. Thus, in so far as it is relevant by way of prompt complaint, the evidence of Constable McCauley was corroborative.

In an effort to undermine the complainant's credibility, much was made of the fact that the respondent never called employees to report for work before 9:00 a.m., and only chambermaids reported at that hour. Waitresses were never employed before the noon hour since Mrs. Czaikowski attended to the breakfast trade. However, a quick review of the respondent's employment records, filed as Exhibit R-1, indicates that, while rare, an 8:00 a.m. report for work was not unprecedented. When it did occur, from the hours worked and the normal hours of the individual concerned, it appears to have involved a waitress. Moreover, from the motel register, part of which was filed as Exhibit C-2, it appears that the night of September 20, 1978 was a relatively busy night for the motel so that a heavy breakfast trade might have been anticipated. All of this lends credibility to the complainant's evidence that she was called to report to work for the morning of September 21.

In corroboration of Mr. Czaikowski's testimony, the respondent called



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Mrs. Czaikowski who testified that she was in or near the office during the events in question and confirmed Mr. Czaikowski's version of events. However, she admittedly moved from the office into the coffee shop, out of view of the complainant and Mr. Czaikowski, although not out of earshot, before the critical stage of the events. Moreover, she gave as the reason for moving that she was bothered by having to observe the events in the office. In light of this, I do not think she can have been paying close attention to what happened after she left the office and I fear that her recollection may have been unduly influenced by Mr. Czaikowski's version of the events.

Frequently, when there is a sharp conflict in the evidence, it can be explained by the frailty of the human memory and the human tendency for memory to be influenced over time by one's self-interest. If witnesses appear candid when giving testimony, the task of the tribunal in resolving the conflict is one of weeding out the effect which these factors have had on the testimony of one witness or another.

Because of one development, however, I am convinced that this is not the appropriate way of looking at this case. In attempting to undermine the complainant's testimony, Mr. Czaikowski testified that there was in fact no backroom to which he might have invited the complainant. Moreover, on the night in question, all of the guest rooms on the first floor of the motel were occupied. In corroboration of this, he produced a list of the motel guests on that night, Exhibit R-2. This list had been prepared by his daughter, who appears to be the respondent's bookkeeper. In pursuance of objections to this evidence by counsel for the Human Rights Commission, the motel register was obtained and pages covering the night in question were entered as Exhibit C-2. A comparison of Exhibit R-2 and Exhibit C-2 reveals

that on the list prepared for the purpose of this hearing a name was inserted as the occupant of room 103 which nowhere appeared on the actual register. The register indicated room 103 was vacant. I can draw no other conclusion than that Exhibit R-2 was deliberately falsified for the purpose of this hearing. In light of the fact that Mr. Czaikowski had asked that this document be prepared and introduced it through his testimony, even if he did not actually prepare it personally, I find it impossible to credit Mr. Czaikowski's evidence in any particular in which it differs from that of the complainant. I find, therefore, that the facts are as set out in the summary of the complainant's evidence above.

This leaves the question whether, on these facts, there was sexual harassment constituting sexual discrimination. There was nothing explicitly sexual about Mr. Czaikowski's remarks, making it at least conceivable that this was simply a case of misunderstanding. On the other hand, harassment does not have to be explicit to be contrary to the Human Rights Code. Harassment can be affected by implication. Stereotyping, the very thing which human rights laws are designed to combat, is actually a facilitator of insult by mere implication. It would be strange if the law allowed harassment to escape its application because, through stereotyping, the harassment was implicit, rather than explicit.

The determination of whether Mr. Czaikowski's intentions were innocent might have been assisted by similar fact evidence in this case. Evidence was tendered from three former employees for the purpose of showing that he had made a number of sexual advances to them during a period of time which included the date of the events in question. In view of the unlikelihood of a series

of similar misunderstandings arising by pure coincidence, such evidence could have been probative and I admitted it. However, after this evidence was received, it became apparent that there was only minimal similarity between the incidents testified to. Only one of the three such witnesses testified to a prima facie case of harassment. Since that incident arose after a period of time during which the witness admittedly misinterpreted Mr. Czaikowski's advances as fatherly, it is hardly relevant to the question of how he would deal with a stranger he had just met. Although one of the other witnesses testified to an incident which might have constituted harassment, the circumstances were ambiguous. The only thing which really was common to the situations involving the other women and that of the complainant is that Mr. Czaikowski seemed prone to create apprehensions of harassment among the respondent's women employees. With only one incident actually confirming those apprehensions, the probative value of this evidence seems heavily outweighed by its prejudicial effect. Therefore, I entirely disregard it.

This leaves the question of whether Mr. Czaikowski's conduct constituted sexual harassment to be determined on the basis of the complainant's evidence. It is clear there was no doubt in her mind of the implication to be drawn from Mr. Czaikowski's suggestions that they go to a backroom or that it could be fun if he drove her home. The latter suggestion indeed is nearly explicit in its sexual connotation. In the absence of any other credible evidence which might reflect on this interpretation, I conclude that the complainant was subjected to sexual harassment. It is clear that, if this is the case, such subjection was made a condition of employment. Therefore, she was denied employment on the basis of sex contrary to section 4(1)(b) of The Ontario

Human Rights Code. As Mr. Czaikowski was both president and manager of the respondent at the relevant time, there is no question of the respondent's liability for this violation of the Code. Since this finding is sufficient to support a remedy under the Code, it is unnecessary to decide whether a contract of employment was actually concluded sufficient to also bring the complaint within the provisions of section 4(1)(g).

REMEDY

The complainant did not claim or prove any damages for loss of income. It was agreed that she suffered special damages in the amount of \$8.00 for taxi fares. In addition she requested compensation for injured feelings, that is, the embarrassment and humiliation she was subjected to, and an apology from the respondent.

Counsel for the Commission suggested an award of \$750.00 for the complainant's injured feelings. If damages in such a case were entirely a matter of first impression, I might be favourable to an award in this amount. However, it is desirable that Boards of Inquiry be consistent in calculating awards under the Code. In the light of previous awards, I do not think an award of this magnitude can be justified.

No evidence was presented of any substantial suffering experienced by the complainant such as that which led to the award of \$1,000.00 in Cousens v. Canadian Nurses' Association (Ontario Board of Inquiry, Ratushny, 1981).

While the complainant testified that Mr. Czaikowski had touched her upon the hand, there was no evidence that she suffered any significant physical assault such as that which led to the awards of \$750.00 in Coutroubis

and Kekatos v. Sklavos (Ontario Board of Inquiry, Ratushny, 1981) and Hughes and White v. Dollar Snack Bar and Jeckel (Ontario Board of Inquiry, Kerr, 1981). Thus, although this case is like the two last named in that it involved sexual harassment, the injury suffered by the complainant is more in the nature of that suffered by other individuals who were denied employment on discriminatory grounds. There is no basis for a larger award for injured feelings than the \$100.00 awarded in Imberto v. Vic and Tony Coiffure (Ontario Board of Inquiry, McCamus, 1981), Bish v. Chez Moi Tavern (Ontario Board of Inquiry, Haynes, 1981), and Fuller v. Candur Plastics Limited (Ontario Board of Inquiry, Kerr, 1981).

With respect to the matter of an apology, the complainant is certainly entitled to an apology and I would have ordered that she be given one to vindicate her position if no other remedy were being granted. However, a true apology is a voluntary recognition of having wronged another person. The value of an apology is substantially diminished when it is given under compulsion. Since a more substantial remedy is available to vindicate the complainant, I see no purpose to be served by a legal order to perform an act which in the circumstances may be virtually meaningless. One may hope that in the light of this decision the respondent will see fit to give the complainant a genuine apology such as she deserves.

The Commission also requested the respondent be ordered to post the Commission's placard setting out the principles of The Ontario Human Rights Code and to subject its hiring practices to monitoring by the Commission for a two-year period. While Mr. Czaikowski is no longer involved in the management of the respondent, Mrs. Czaikowski and their daughter, who presently operate the motel, were also involved at the time when this complaint arose.

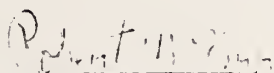
Moreover, some of Mrs. Czaikowski's responses as a witness indicated that she was not fully sympathetic to the objectives of the Code. In these circumstances, an order for the posting of the Commission's placard is appropriate.

On the other hand, it seems unlikely that actual violations of the Code of the type which occurred in this case are still taking place in the absence of Mr. Czaikowski. It is unnecessary and would be unduly onerous to subject the respondent to an order for monitoring its hiring practices, therefore.

ORDER

1. It is ordered that the respondent Traveller Inn (Sudbury) Limited pay the complainant Lynda Mitchell the sum of \$108.00, being \$8.00 for special damages and \$100.00 for injured feelings.
2. It is further ordered that the respondent Traveller Inn (Sudbury) Limited post in a conspicuous place in its reception area a placard supplied by the Ontario Human Rights Commission setting out the principles of The Ontario Human Rights Code.

DATED at Windsor this 7th day of October, 1981.



Robert W. Kerr
Board of Inquiry

